Supreme Court, U. S.
FILED
MAY 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, JOHN B. BRADSHAW, ROSALINDA M. MARTINEZ, JAMES W. MYART, JR., VIRGINIA ZAMORA, MANUEL MUNOZ, JR. and REBECCA V. GARCIA and HENRY CISNEROS in his official capacity as a member of the City Council of the City of San Antonio, Texas,

Petitioners,

versus

CITY OF SAN ANTONIO, TEXAS, LILA COCKRELL, in her official capacities as Mayor of the City, elective member of the City Public Service Board of San Antonio and member of the City Council only, ELOY CENTENO, GLENN BIGGS, RUBEN ESCOBEDO and EARL HILL, JR., only in their official capacities as members of the Board; JOE WEBB, HELEN DUTMER, FRANK WING, BERNARDO EURESTE, RUDY ORTIZ, JOE ALDERETE, PHIL R. PYNDUS, JOHN STEEN and BOB McDANIEL, only in their official capacities as members of the City Council,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CRAIG L. AUSTIN
Suite 727, 711 Navarro
San Antonio, Texas 78205
(512) 222-2331

Attorney for Petitioners

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

Citation to the Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 7

Statement 7

Reasons for Granting the Writ 12

Conclusion 30

Certificate of Service 32

Appendix A (Constitutional Provisions and Statutes) 1a

Appendix B (Opinion of the Court of Appeals) ... 5a

Appendix C *(City Public Service Board of San Antonio v. Association De Obreros,* 197 N.L.R.B. 312 [1972]) 11a

CITATIONS

Constitution of the United States:

Article IV, Section 4 7,8,20,22,24,29

14th Amendment 6,7,8,25,26,29

15th Amendment 29

Statutes of the United States:

28 U.S. C. §1254(1) 2

CITATIONS (Continued)

Page

28 U.S.C. §1343 29

28 U.S.C. §2201 8

28 U.S.C. §2202 8

42 U.S.C. §1971, et seq. 8,28

42 U.S.C. §1973 1 29

42 U.S.C. §1973 1(c) 8

42 U.S.C. §1973 1 (c) (1) 7,29

42 U.S.C. §1973 j (f) 8

42 U.S.C. §1981 8

42 U.S.C. §1983 et seq. 7,28,29

42 U.S.C. §1988 8

Statutes of the State of Texas:

TEX. REV. CIV. STAT. ANN, art. 1111a §2 (1963) 7,11

TEX. REV. CIV. STAT. ANN. art. 1111b §2 (1963) 7,11

TEX. Rev. CIV. STAT. ANN. art. 1115 (1963) . 7,28,30

TEX. REV. CIV. STAT. ANN. art. 1446C §3(c) (Supp. 1978-79) 14

TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970) 7,15

TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1979) 7,15

CITATIONS (Continued)

Cases: Page

Alaniz v. City of San Antonio, 80 L.R.R.M. 2983 (1971) 13,17

Avery v. Midland County, 390 U.S. 474, 20 L.Ed.2d 45, 88 S. Ct. 1114 (1967) 25

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 82 S. Ct. 691 (1962) 23,26

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612 (1976) 4,30

Burger v. Judge, 364 F. Supp. 504 (D.C. Mont. 1973) 24

City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972) 13,18

Colgrove v. Green, 238 U.S. 549, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946) 22,23

Delta Electric Construction Company v. City of San Antonio, 437 S.W.2d 602 (Tex. Civ. App.-San Antonio 1969, writ ref'd n.r.e.) 17

Guadalupe-Blanco River Authority v. Tuttle, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio 1942, aff'd 141 Tex. 523, 174 S.W.2d 589) 8,14,18

Hadley v. Junior College District, 397 U.S. 50, 25 L.Ed.2d 45, 90 S. Ct. 791 (1969) 25

Katzenbach v. Morgan, 384 U.S. 641, 16 L.Ed.2d 828, 86 S. Ct. 1717 (1966) 29

CITATIONS (Continued)

Page

Kohler v. Tugwell, 292 F. Supp. 978, (D.C. La. 1968, aff'd 393 U.S. 531) 24

Morris v. City of San Antonio, 572 S.W.2d 831 (Tex. Civ. App.-Austin 1978, writ pending) 14

Ortiz v. Colon, 385 F. Supp. 111 (U.S.D.C. Puerto Rico 1974) 26

Raton Public Service Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966) 19

Reynolds v. Simms, 377 U.S. 533, 12 L.Ed.2d 506, 84 S. Ct. 1362 (1964) 24,26

Sailors v. Kent Board of Education, 387 U.S. 105, 18 L.Ed.2d 650, 87 S. Ct. 1549 (1966) ..25-26

San Antonio Independent School District v. Board of Trustees of the San Antonio Electric and Gas System, 204 S.W.2d 22 (Tex. Civ. App.-El Paso 1947, writ ref'd) 14

San Antonio Independent School District v. City of San Antonio, 550 S.W.2d 262 (Tex. 1976) 14

Vansickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973) 24

Victoria v. Village of Muscoda, 228 Wis. 445, 279 N.W. 663 (1938) 19

Wesberry v. Sanders, 376 U.S. 1, 11 L.Ed.2d 481, 84 S. Ct. 526 (1964) 26

CITATIONS (Continued)

Page

Zachary v. City of San Antonio, 296 S.W.2d 299 (Tex. Civ. App.-San Antonio 1956, aff'd 157 Tex. 551, 205 S.W.2d 558) 15-16

Miscellaneous:

I The Federalist No. 39, p. 257 (M. Dunne ed. 1909 - J. Madison) 20,21

40 TEX. JUR. 2d 446 *Municipal Corporations* §685 et seq. (1978) 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

CLIFTON BYRD, et al,
Petitioners,

versus

CITY OF SAN ANTONIO, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 2, 1979.

CITATION TO THE OPINION BELOW

The opinion of the Court of Appeals is reported at 587 F.2d 184. No opinion was written by the District Court.

JURISDICTION

The judgment of the Court below (Appendix A) was entered on January 2, 1979. A timely petition for rehearing was denied on February 2, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The purpose of this application is to examine the constitutionality of a novel device for the administration of public property, funds and employees — the self-perpetuating proprietary board. By the term "self-perpetuating" is meant a system of succession in office whereby the remaining members of the board select a new officer when one of their number reaches the end of his term, resigns or dies. The term also applies to an officer's re-election for additional terms by his own appointees.

The City Public Service Board of San Antonio was created by city ordinance in 1942. First members of the Board were appointed by the City Commission. However, the indenture of August 1, 1942, contained a unique procedure for extension of the Trustee's terms and selection of their successors in office. The provision was carried forward verbatim in the refinancing indenture of February 1, 1951:

> ". . . All vacancies in membership on the Board, whether occasioned by failure or

> refusal of any person above named to accept appointment or by expiration of the term of office or otherwise, shall be filled by the majority vote of the remaining members of the Board of Trustees. . . The term of office of each member elected to the Board . . . shall be five years. A person who has served as a member of the Board . . . shall be eligible to be re-elected for one additional five-year term, and one only." (R. 216, p. D-6 of Ex. "N")

The appointed Trustees have staggered terms. Excepting every fifth year, a vacancy occurs annually on January 31. (R. 217, p. D-6 of Exhibit "O")

In Anglo-American jurisprudence, the flow of political and economic power in both governmental and non-governmental entities has been regularized into a simple and time-proven process. The procedure insures continuous or periodic accountability by the officers and employees charged with public or private administration:

Voters	Representatives	Officers	Employees
	Election →	Appointment →	Appointment →
Owners	Directors	Officers	Employees

Whether the City Public Service Board be public or private, giving its officers control over their own succession and permitting them collectively to re-elect themselves for additional terms is nothing more nor

less than brazen usurpation of the constitutional selection rights of the voters and owners. Such a contrivance is equally destructive of the constitutional right of the elected representative or director to exercise the power of appointment which has been duly conferred upon him.

That the Court of Appeals should approve such a patent misappropriation of the political and property rights of the people of San Antonio is shocking. But the potential application of the ruling is more than shocking. It is dangerous in the extreme.

The Court of Appeals gives blanket exemption from constitutional control or accountability to a self-selecting proprietary unit. Such entities may, therefore, under the authority of the opinion, be freely implemented by states, counties, cities, school districts and other local governmental units.[1] Operational control of their proprietary activities, including electric, gas, and water utilities systems, dams and reservoirs, storm sewers, streets, sidewalks, public ways, garages, parks, zoos, auditoriums, places of amusement, stadiums, swimming pools, radio stations, ports, ferries, wharves or any other commercial activity may be divested from electoral control. 40 TEX. JUR. 2d 446 *Municipal Corporations* §685 et. seq. (1978).

---

1 The system of selection in question is plainly prohibited for the appointment of Federal officers by the appointments clause of the U.S. Constitution. See *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612 (1976).

It is inevitable that large numbers of self-perpetuating proprietary boards will be created under the authority of the Court of Appeals opinion. The reason: such a board is the ultimate patronage device. An existing administration may separate one of its proprietary functions from the direct or indirect control of the voters and owners, create a self-selecting board to control that proprietary function and enter into indenture contracts with borrowers insuring its indefinite continuance. By an unlimited number of bonds refinancings and extensions, the appointees and their personal assigns are kept in power as long as it is expedient to borrow money. Control of the voters and owners is yielded up, supposedly, as collateral for the loan.

Such an opportunity is particularly tempting to lame-duck administrations which have been rejected by the electorate. Massive portions of the governmental body may be removed from the influence and control of their successors. More importantly, power may be vested in their personally-selected appointees and the successors chosen by those appointees.

Precedent-setting issues determined by the Court of Appeals and the Supreme Court's disposition of this application include:

1. Whether a political subdivision of the state and a department or agency of a municipal corporation, created and initially appointed by the City Commission, operating and holding public facilities and property, expending public funds, staffed by city employees

and enjoying uniquely governmental powers, privileges and immunities, is, as a matter of law, a "form of government."

2. Whether a system whereby public officers collectively choose their own successors and determine the extension of their own incumbancies is a "republican" form of government.

3. Whether in the absence of a "political question," the enforcement of the Guaranty Clause is within the jurisdiction of the federal courts.

4. Whether a scheme for selection of governmental officers which allows the entire electorate of the city only one vote in the selection of certain public officers and allows each of three other persons who have no constituency or representative capacity an equal vote is a massive and unreasonable non-geographic malapportionment of voting power in violation of the Equal Protection Clause of the Fourteenth Amendment.

5. Whether an enactment of a public body restricting appointment to public office to appointees of that body and their sub-appointees invidously discriminates against voters who voted against the members of that body and against voters who were too young to participate in the election of the body.

6. Whether the Civil Rights Act of 1871 and the Voting Rights Act of 1965 may be invoked to restore a

self-perpetuating municipal utility monopoly to the direct or indirect control of the voters and its owners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal constitutional provisions in question are Article IV, Section 4 (Guaranty Clause) and the Fourteenth Amendment (Equal Protection Clause). Federal statutes are the Civil Rights Act of 1871, 42 U.S.C. §1983 et seq., 17 Stat. 12 and the Voting Rights Act of 1965, 42 U.S.C. §1973 1(c)(1), 79 Stat. 445.

Texas statutes include under Title 28 "Cities, Towns and Villages" the following: TEX. REV. CIV. STAT. ANN. arts 1111a §2 and 1111b §2 (1963), Acts 1949, 51st Leg. p. 463, ch. 24 and Acts 1949, 51st Leg. p. 465, ch. 250, respectively. Under the same title, TEX. REV. CIV. STAT. ANN. art. 1115 (1963), Acts 1911, p. 230. Under Title 110 A, "Public Office, Officers and Employees" the following: TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970) and art. 6252-17a (Supp. 1979), Acts 1967, 60th Leg., p. 597, ch. 271 and Acts 1973, 63rd Leg., p. 1112, ch. 424, respectively.

STATEMENT

Petitioners are registered voters and residents of the City of San Antonio. All are ratepayers for municipal electrical and gas utility services provided by the City Public Service Board of San Antonio. (R. 78-80) All

Petitioners are under the age of 58 years and, therefore, were not qualified because of minority to vote for candidates winning election to the City Commission in 1942. (R. 81)

Petitioner Cisneros is a duly elected City Councilman who was realigned and a party plaintiff subsequent to the filing of suit. (R. 4-5 and 136-45)

The City of San Antonio, a municipal corporation and political subdivision of the State of Texas, Mayor Cockrell and Councilpersons Webb, Dutmer, Wing, Eureste, Ortiz, Alderete, Pyndus, Steen and McDaniel are Respondents.

Mayor Cockrell is an ex officio member of the City Public Service Board, a municipal board of the City of San Antonio. Respondents Centeno, Escobedo, Biggs and Hill are appointed members of the Board. The Board, being a department or agency of the City, has no legal capacity to sue or be sued[2] and, accordingly, is not a party to the suit or this appeal.

Jurisdiction of the United States District Court was duly invoked pursuant to Art. 4, sec. 4 and Amendment XIV to the Constitution (4), 28 U.S.C., §§2201 and 2202, and 42 U.S.C., §§1971, 1973 1(c) and j(f), 1981, 1983 and 1988.

---

2 *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio 1942, aff'd 141 Tex. 523, 174 S.W.2d 589).

San Antonio acquired its gas and electric utilities in 1942 from the American Light & Traction Company, which had been ordered by the Federal government to sell properties under provisions of the Holding Company Act of 1933. (R. 217, p. 24 of Ex. "O")

The San Antonio Public Service Company, a subsidiary of American Light & Traction Company, was sold to the City of San Antonio for $33,950.00. At the time of purchase, the City paid nothing from funds raised by taxation. The entire purchase price was raised by revenue bonds issued by the City, to be repaid over a period of thirty years.

The City Public Service Board of San Antonio was created by indenture dated August 2, 1942. By terms of that indenture, the Board was to be composed of five (5) persons. One, the Mayor of the City, was a member of the Board *ex officio*. The other four members were initially appointed by the City Commission. Thereafter, as vacancies occurred among the appointed members, they were to be filled by majority vote of the remaining members.

On March 5, 1942, the City was 40.46 square miles in size, compared with its present size of 263.0219 square miles. Population in 1942 was approximately 253,854 persons, contrasted to a 1970 population of 654,153.

In 1951, the Board's indebtedness was paid and completely refinanced through an indenture which, in Arti-

cle VI, Section 1, continued both the membership and the self-appointment of the previous Board.

From 1951 through August, 1976, there have been ten (10) additional issues of Revenue Bonds in the total principal amount of $390,000,000. The first seven issues of Revenue Bonds, in the total principal amount of $220,000,000, incorporated by reference the basic provisions of the Indenture of 1951, including the method of appointment to vacancies occurring in the Board. All Indentures and supplemental issues were authorized by and incorporated into Ordinances of the City Council. Recent issues of Revenue Bonds are "New Series" Revenue Bonds which are junior lien bonds issued under Ordinances providing for a Trustee selection method different from that prescribed in the 1951 Indenture and supplements thereto. The new selection method will become effective in 1997 upon the payment or retirement of all of the Old Series Bonds issued prior to October, 1975.

All revenue bonds of the City of San Antonio payable from the net revenues of the electric and gas systems of the City and issued prior to 1957 have been retired. The last of the Old Series Bonds, issued in 1974 and incorporating by reference the provision for self-appointment will reach maturity in 1997. (R. 217, p. B-3 of Ex. "O")

In 1953, the form of city government was changed from city commission to city council. After 1953, and

until 1975, the Mayor of the City was a councilman selected by the majority vote of a Council of nine (9) members, each elected at large. In 1974, the City Charter was changed so as to provide for direct election of the mayor. As a consequence, the Board is now composed of one person elected at large by the citizens and four persons who are appointed by the process above described.

As of January 31, 1976, the City's equity has risen to $436,977,000, contrasted with indentured indebtedness of $239,035,000. When the bond issues of 1976, totaling $120,000,000 are taken into account, the City's ownership equity remains in excess of the indentured debt. (R. 217, p. B-3 of Ex. "O")

Contrary to the opinion of the Court of Appeals, the present City Council is, indeed, powerless to change the system. The scheme's legality is established by the Court's opinion, leaving only the alternative of complete refinancing as a means of ridding the City of its uncontrollable and unaccountable department. But refinancing is currently prohibited by statutes which the Court overlooks.[3]

Unless future interest rates fall below the rates carried by existing bonds — 3.03% to 6.95% — the City is stuck with an autonomous agency until 1997.

---

3 TEX. REV. CIV. STAT. ANN. arts 1111a, §2 and 1111b §2 (1963) provide "[R]efunding bonds shall bear interest at the same or lower rate than borne by the bonds refunded."

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by the Supreme Court because it overrules controlling Federal authority, contravenes existing Texas authorities defining the governmental structure of that State and refuses to enforce federal constitutional provisions and statutes protecting Petitioners' electoral rights.

I

The City Public Service Board, A Political Subdivision Of The State Of Texas And A Department Or Agency Of The City Of San Antonio, Created And Initially Appointed By The City Commission, Operating And Holding Public Facilities And Property, Expending Public Funds, Staffed By City Employees And Enjoying Uniquely Governmental Powers, Privileges And Immunities, Is, As A Matter Of Law, A "Form Of Government."

Validity of the Court of Appeal's decision turns upon its determination that the City Public Service Board "is not a form of government but is a board of managers of the municipally-owned San Antonio electric and gas system, held and operated as a corporate and proprietary activity of the City of San Antonio." Exemption of proprietary activities of state and local governments from constitutional inhibitions is an unprecedented decision of major significance.

Two federal authorities which have expressly considered and determined the governmental status of the City Public Service Board are overruled by the Court of Appeals.

In Cause No. SA 70-CA 204, *Alaniz v. City of San Antonio,* 80 L.R.R.M. 2983 (1971) the District Court for the Western District of Texas, composed of a three-judge constitutional panel, held that the trustees of the City Public Service Board are "officials of . . . a city, municipality or other political subdivision of the state" and its employees are "public employees" so as to be exempt from collective bargaining.

Attached as Appendix C is *City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos,* 197 N.L.R.B. 312 (1972). Therein, the "Employer (C.P.S.B.) contends that it is an agency of the City of San Antonio and is thus exempt from the Board's (N.L.R.B.) jurisdiction as a political subdivision of the State of Texas." Recognizing that ". . . The employer (C.P.S.B.) has the power of eminent domain. . ." and detailing not less than thirteen other governmental powers, privileges and immunities, the National Labor Relations Board concluded "that the City Public Service Board is a political subdivision exempt from the coverage of the act." A "political subdivision" is, *per se,* a form of government.

Numerous prior adjudications by the Texas courts specifically establishing the governmental character of the City Public Service Board are ignored by the Court

of Appeals. The leading case holds that the Trustees do not have status as a legal party separate and apart from the City. *Guadalupe Blanco River Authority v. Tuttle*, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio 1942, aff'd 141 Tex. 523, 174 S.W.2d 589). Justice Norvell, later to sit on the Supreme Court of Texas, wrote:

> "In the legal sense, the Appellees are not trustees at all. As a board they constitute a department and agency of the City to take charge and operate for the City its electric and gas system."

The dissenting opinion in that case is chiefly notable for its candid acknowledgement that the Board is "self-perpetuating."

Subsequent Texas cases to which the City of San Antonio was a party and the status of the Board was in issue held that the funds of the Board are "public money,"[4] its property is immune from *ad valorem* taxation by other governmental entities[5] and it is exempt from regulation as a private utility under the Public Utility Regulatory Act, TEX. REV. CIV. STAT. ANN. art 1446C §3(c) (Supp. 1978-79) because it is a "municipal corporation."[6]

---

4 *San Antonio Independent School District v. Board of Trustees of the San Antonio Electric and Gas System*, 204 S.W.2d 22 (Tex. Civ. App.-El Paso 1947, writ ref'd).

5 *San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262 (Tex. 1976).

6 *Morris v. City of San Antonio*, 572 S.W.2d 831 (Tex. Civ. App.-Austin 1978, writ pending).

Two Texas statutes, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1979) and art. 6252-17 (1970) define the Board as a "governmental body." Article 6252-17 provides, in part:

> "Section 2. In this Act: (1) 'governmental body' means . . . (c) every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; . . .
>
> "(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof; . . ."

It should be noted in this respect that the salaries of the Trustees are paid out of "public funds." (R. 217, p. D-7 of Ex. "O")

Texas law must be considered in defining the "governmental" or "non-governmental" status of a state body and in determining the applicability of federal constitutional and statutory prohibitions enforceable upon local governmental units. In considering the status of a 40-year lease to an individual for the control and operation of a parking garage, undeniably a "proprietary" function, it was held in *Zachry*

v. City of San Antonio, 296 S.W.2d 299 (Tex. Civ. App.-San Antonio 1956, aff'd 157 Tex. 551, 205 S.W.2d 558):

> ". . . Having established, by the charter powers and recitals in the ordinance, the City's power to maintain the garage, appellant takes the position that it was, after all, not a general public power, but a local non-governmental facility which may be delegated or leased.
>
> "The question is one of delegation of public powers."

The Court of Appeals rests its holding that the City Public Service Board is not a "form of government" upon its analysis that the Board cannot "as a matter of law, exercise in its own right any governmental powers." Apparently, the Court has failed to take into account the comprehensive delegation of city powers under Article 6 of the Indenture. (Ex. "O", p. D-6):

> "[T]he Board of Trustees shall have absolute and complete authority and power with reference to the control, management and operation of the systems and the expenditure and application of revenues of the systems . . . In connection with the management and operation of the systems and expenditure and applications of the revenues therefrom, the Board of Trustees shall be vested with all of the powers of the City with respect thereto. . ."

In addition to the general delegation of power, specific provisions of the Indenture and an overwhelming body of case law establishes the numerous and uniquely governmental powers enjoyed by the City Public Service Board:

1. *Power of Appointment to Public Office.* That the Trustees are "officials of . . . a city" was determined by *Alaniz v. City of San Antonio, supra. Delta Electric Co., Inc. v. City of San Antonio,* 437 S.W.2d 602 (Tex. Civ. App.-San Antonio 1969, writ ref'd n.r.e.) held that all members of the municipal boards of San Antonio are "officers" of the city.

2. *Power of Appointment and Discharge Over 2,754 Public Employees.* By terms of its Indenture (Ex. "O", p. D-7), "The Board of Trustees shall appoint all officers and employees. . ." In *Alaniz v. City of San Antonio, supra,* it was held that the Board's employees are "public employees."

3. *"[A]bsolute and complete authority and power with reference to the . . . expenditure and application of the revenues of the systems . . . (supra)"* This amounted to $271,161,300 in 1976. (Ex. "O", p. 9)

4. *Power of Eminent Domain.* It is appropriate at this point to call to the attention of the Court another point of law relied upon by the Court of Appeals which is plainly untenable. The panel concludes "Only the Council can authorize condemnation of land." In fact,

the Indenture creating the Board specifically provides that ". . . [T]he Board shall be vested with all of the powers of the City with respect thereto . . . shall have full authority with reference to making of extensions . . . *and the acquiring by purchase or condemnation of properties of every kind in connection therewith*" (Emphasis added) (Ex. "O", p. 68)

5. *Power to Sue or Defend Suits in the Name of the City.* See, *Guadalupe-Blanco River Authority v. Tuttle, supra.*

6. *"Full authority with reference to the making of extensions, improvements and additions to the systems . . ." (Ex. "O", p. D-7)* This includes, of course, the power to locate and build highly controversial nuclear power plants and other unwelcome facilities. See *Guadalupe-Blanco v. Tuttle, supra.*

7. *". . . [P]ower and authority to make rules and regulations governing the furnishing of service . . . to customers . . . and for discontinuance of such services."* (Ex. "O", p. D-7)

While the panel does not take into account the Board's enjoyment of governmental privileges and immunities, they are, in many cases, as subject to abuse and as needful of direct or indirect electoral accountability as governmental powers. As detailed in *City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, supra,* they include: exemption from federal, income, excise and gift taxation, exemption of employees from social security taxes, exemption from unionization and collective bargaining, exemption

from the statutes of limitation, borrowing in the name of and against the credit of the City, defense of civil suits on lack of notice to the City and beneficial enjoyment of realty titled in the name of the City.

The holdings of the highest courts of other states were not persuasive to the Court of Appeals. In *Raton Public Service Company v. Hobbes,* 76 N.M. 535, 417 P.2d 32 (1966), the Supreme Court of New Mexico held:

> "We would direct attention to other cases wherein the technical form has not been considered controlling, and where corporate instrumentalities for accomplishing public ends, whether governmental or proprietary, have been considered to be governmental agencies. (citing authorities)"

Squarely in point and diametrically opposed to the Court of Appeal's unsupported conclusion is the holding of the Supreme Court of Wisconsin in *Victora v. Village of Muscoda,* 228 Wis. 445, 279 N.W. 663 (1938):

> "Although the village utility may act in a proprietary capacity when it sells power, the relation between the village and its officers is governmental even when the officers are performing duties which relate to the management of the utility. In the performance of those duties, the officers are subject to the general law which governs the conduct of village affairs."

II

A System Whereby Public Officers Collectively Choose Their Own Successors and Appoint The Officers Who Will Determine The Extension Of Their Own Incumbencies Is Not A "Republican Form Of Government" As Guaranteed To The People By Article IV, Section 4 Of The Constitution Of The United States.

Article IV, Section 4, of the Constitution of the United States provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government. . ."

While the Constitution contains no definition of the term "Republican form of government," the writings of James Madison, author of the Guaranty Clause are relevant. Madison poses the question: "What, then, are the distinctive characters of the republican form? . . ." He writes:

> "[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to

> such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. I The Federalist No. 39, at 257 (M. Dunne ed. 1901) (J. Madison)."

Cases pertaining to the validity of self-prepetuating municipal agencies are nonexistent. The City Public Service Board of San Antonio is unique, a *rara avis*. Self-perpetuating governments, while common in other portions of the earth, are unknown to Anglo-American constitutional jurisprudence. This is a case of first impression.

It is fatuous to pretend that a municipal utility board having one elected representative and four self-perpetuating members is "republican." The power of

the City was invested in this unit of government in 1942. As determined only by their untrammeled personal discretion, the original public appointees then transmitted the power to non-public appointees of their own choosing. For over a third of a century this process has continued.

As a matter of law, the perpetuation of governmental power in the hands of a tiny clique of persons not answerable to the voters is a naked usurpation of the power and repugnant to the Constitution. Except by order of this court re-establishing the long-denied rule of the electorate, the people have no remedy by which they may reclaim this vital portion of their City Government.

III

In The Absence Of A "Political Question," The Enforcement Of The Guaranty Clause Is Within The Jurisdiction Of The Federal Courts.

It is indeed remarkable that the Court of Appeals should rely upon *Colgrove v. Green*, 238 U.S. 549, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946) in support of its holding that the "guaranty clause is primarily political in nature, and its enforcement is a matter for congress rather than the courts." That case held that the apportionment of congressional districts in Illinois was not the concern of the federal courts. It is apparent that the holding — and the

rationale — in *Colgrove v. Green* was overruled by *Baker v. Carr*, 369 U.S. 186, S. Ct. 692, 7 L.Ed.2d 663 (1962):

> ". . . [T]here should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing. . .
>
> "We conclude then that the non-justiciability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought 'political,' can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them non-justiciable. Specifically, we have said that suchs claims are not held non-justiciable because they tough matters of state governmental organization

Recent cases applying Article IV, Section 4, in controversies held to be not "political" are *Reynolds v. Simms*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S. Ct. 1362 (1964); the majority concurring opinion in *Kohler v. Tugwell*, 292 F. Supp. 978 (D.C. La. 1968, aff'd 393 U.S. 531); *Burger v. Judge*, 364 F. Supp. 504 (D.C. Mont. 1973) and *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

How can the irreversable removal of a segment of the city government from political process constitute a "political question?" Confronted on one side with the Court's declaration of the Board's legality and on the other with a statutory prohibition against refinancing its bonds at current interest rates, no amount of political activity can bring about a restoration of public control.

Petitioners' dissatisfaction with the philosophy, performance and actions of the members of this self-perpetuating board cannot be expressed at the polls, nor can it be resolved by any exercise of their position as the Board's owners. The absence of a political remedy, which is the very essence of Petitioners' complaint, belies the existence of a political question.

IV

A System For The Selection Of Public Officers In Which The Vote Of One Person Who Has No Constituency Or Representative Capacity Equals The Vote Of The Entire Body Politic Is A Massive And Unreasonable Non-

Geographic Malapportionment Of Voting Power Contravening The Fourteenth Amendment To The Constitution Of The United States.

The holders of revenue bonds issued by the City of San Antonio, payable out of receipts from the sale of electricity and gas, are represented by two trustees, the Harris Trust and Savings Bank of Chicago and F. O. Mann. Respondents Centeno, Biggs, Escobedo and Hill are not appointed by and do not purport to represent the holders of the revenue bonds. They have no constituency from whom they are elected or to whom they are accountable unless it be the three or four persons who selected each of them, or very, very remotely, the electorate which selected the City Commission of 1942. Certainly, they derive no legitimacy of office from the current electorate of the City. Under the terms of the indenture, each appointed trustee is responsible only to himself.

Having no constituency and, therefore, no representative capacity, the vote of each appointed member in the selection of a new trustee can only be considered as the vote of an individual citizen. As a consequence, there is a vast and unlawful enhancement of the voting power of these three electors in relation to the voting power of all other residents. Such disparity is condemned by *Hadley v. Junior College District*, 397 U.S. 50, 25 L.Ed.2d 45, 90 S. Ct. 791 (1969); *Avery v. Midland County*, 390 U.S. 474, 20 L.Ed.2d 45, 88 S. Ct. 1114 (1967); *Sailors v. Board of Education*, 387 U.S. 105, 18 L.Ed.2d 650, 87

S. Ct. 1549 (1966); *Reynolds v. Simms*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S. Ct. 1362 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 11 L.Ed.2d 481, 84 S. Ct. 526 (1964); and *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S. Ct. 691 (1962).

While the above-entitled authorities condemn malapportionment among geographical areas, the principle which they establish and enforce — equality of voting power — applies as well to a non-geographical malapportionment.

V

An Ordinance Of A Political Body Imposing A Future Limitation Upon The Holding Of Public Office To The Body's Appointees And Their Assigns Invidiously Discriminates In Favor Of Voters Supporting Candidates Winning Election To The Body And Against Voters Who Support Losing Candidates Or Who Are Excluded From The Electoral Process By Minority. Such An Act Is Forbidden By The Fourteenth Amendment To The Constitution Of The United States.

In *Ortiz v. Colon*, 385 F. Supp. 111 (Puerto Rico, 1974), a three-judge district court decision subsequently appealed to the Supreme Court of the United States and then remanded for determination of mootness, the Council of the City of San Juan was partially elected and partially appointed. Twelve members were elected

by the voters. Five were appointed by the Governor of Puerto Rico. The case held that voters in the City of San Juan who cast their ballots for both the winning candidates for the City Council and the winning candidate for governor had more voting power than residents of the City of San Juan who did not support the winning gubernatorial candidate. Such disparity was held to abridge the Fourteenth Amendment to the Constitution of the United States.

The City Public Service Board of San Antonio is partially elected and partially appointed. One member, the Mayor of the City, is elected by the voters. Such legitimacy as the four appointed members may have is derived from their remote predecessors being in the favor of persons who won election to the City Commission which held office in 1942. As a consequence, all present residents of the City of San Antonio who could not or did not vote for candidates winning election to the City Commission of 1942 are subjected to permanent discrimination in favor of those who did.

The burden of this discrimination falls principally upon persons who were ineligible in 1942 to vote because of their minority — that is, any person presently under the age of 58 years.

While the ingenuity of the winning candidates composing the City Commission of 1942 in perpetuating their appointees in public office for one-third of a century must be accorded grudging admiration, it is beyond dispute that there have been massive changes

in the City, its population, the electorate and the electoral process. Yet, if anyone or anything can be said to control the City Public Service Board, it is surely the dead hand of the past. It is a clever, but curious, anachronism, the effect of which is to exclude younger generations and new political and economic concepts from the administration of the Board.

VI

The People's Right To A "Republican Form Of Government" And To Equal, Non-Discriminatory And Unimpaired Distribution Of Voting Power Is Both A Civil Right Protected By The Civil Rights Act Of 1871, 42 U.S.C. §1983 Et Seq, And A Voting Right Enforceable By The Voting Rights Act Of 1965, 42 U.S.C. §1971 Et Seq.

Respondents erroneously claim the authority of TEX. REV. CIV. STAT. ANN. art. 1115 (1963) and city ordinances purportedly enacted thereunder as the basis for the present system of selecting public officers to sit on the City Public Service Board of San Antonio. Consequently, they are clearly subject to 42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Petitioners have duly plead the statute, 28 U.S.C. §1343, empowering this court to enforce the civil rights legislation.

In *Katzenbach v. Morgan*, 384 U.S. 641, 16 L.Ed.2d 828, 86 S. Ct. 1717 (1966), the Supreme Court, in considering the constitutionality of the Voting Rights Act of 1965, specifically raised the question of the enforceability of Art. IV, §4 of the Constitution of the United States under its provisions. Finding sufficient basis for the legislation under other provisions of the Constitution, the question was not resolved. Petitioners urge that Congress has elected to enforce the Guaranty Clause by enactment of the Voting Rights Act of 1965.

Moreover, Petitioners have established that they have equally valid causes of action under the Fourteenth and Fifteenth Amendments to the Constitution which are actionable under either 42 U.S.C. §1983 or 42 U.S.C. §1973 1.

As a voting right, Petitioners' causes of action are specifically made enforceable by 42 U.S.C. §1973 1(c)(1) which states "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any . . . election."

That the Petitioners' votes are less than 50% effective is apparent. City funds budgeted and spent by the Board which is beyond the power of San Antonio's voters greatly exceed public money spent by their elected representatives. Two out of three city employees are answerable only to a self-perpetuating Board.

Petitioners are entitled to a declaratory judgment and to injunctive relief under the facts plead herein. See Petitioners' pleadings relative to the jurisdiction of the District Court. (R. 77)

All empowering legislation plead by Petitioners is comprehensive and protective in nature. It should properly be given the broadest scope of application so as to achieve its stated objectives.

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612 (1976), sets forth the remedy. The City Council should be ordered to determine the "election of . . . (the Trustees) . . . successors. . ." by public appointment or election as contemplated by TEX. REV. CIV. STAT. ANN. art. 1115 (1963).

CONCLUSION

From the inception of the republic, voters and citizens of states and local governmental units have routinely enjoyed the benefits of the "strictures of republicism and federal voting controls" which the

Court of Appeals denies the citizens of San Antonio. An exhaustive search of Anglo-American jurisprudence reveals no instance in which citizens have been subjected to a state or local unit — whether "governmental" or "proprietary" — which they are powerless to directly or indirectly control or oust through the electoral process.

The City Public Service Board of San Antonio is a monopoly. It is not subject to competitive restraints. Its present scheme of control and operation leaves this segment of the city government unaccountable to and uncontrollable by the constitutional, statutory and regulatory forces which the law has evolved for the governance of monopolies. The Board is beyond the power of the voters, its owners, the bondholders and even of the Texas Public Utility Commission.

Unless this Court is prepared to countenance the piecemeal dismemberment of duly elected state and local governments by the transfer of their "proprietary" functions to self-perpetuating boards, the decision of the Court of Civil Appeals must be reviewed and set aside and representative government re-established in San Antonio.

CRAIG L. AUSTIN
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, certified mail, return receipt requested, to:

Mr. Crawford Reeder
Assistant City Attorney
City Hall Annex
San Antonio, Texas 78205
Attorney for City of San Antonio

Mr. F. W. Baker
1500 Alamo National Bldg.
San Antonio, Texas 78205
Attorney for City Public Service Board

DATED this ____ day of May, 1979.

CRAIG L. AUSTIN

APPENDIX A

Constitutional Provisions and Statutes

Constitution of the United States:

Article IV, Section 4:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

Fourteenth Amendment:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Statutes of the United States:

Civil Rights Act of 1871, 42 U.S.C. §1983 et seq., 17 Stat. 12:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Voting Rights Act of 1965, 42 U.S.C. §1973 1(c)(1), 79 Stat. 445.

"The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Statutes of the State of Texas:

Title 28, "Cities, Towns & Villages"
TEX. REV. CIV. STAT. ANN. arts. 1111a §2 and 1111b §2 (1963) Acts 1949, 51st Leg., p. 463, ch. 24 and Acts 1949, 51st Leg., p. 465, ch. 250, respectively (quoted segments are identical):

"Such refunding bonds shall bear interest at the same or lower rate than borne by the bonds refunded, unless it is shown mathematically that a saving will result in the total amount of interest to be paid and that the annual principal and interest burden will not be increased so as to infringe upon or impair the rights of the holders of any bonds enjoying a prior or inferior lien."

TEX. REV. CIV. STAT. ANN. art. 1115 (1963), Acts 1911, p. 230:

"The management and control of any such system or systems during the time they are encumbered, may by the terms of such encumbrance, be placed in the hands of the city council of such town, or may be placed in the hands of a board of trustees to be named in such encumbrance, consisting of not more than five members, one of whom shall be the mayor of such city or town. The compensation of such trustees shall be fixed by such contract, but shall never exceed five per cent of the gross receipts of such systems in any one year. The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance. In all matters where such contract is silent, the laws and rules governing the council of such city or town shall govern said board of trustees so far as applicable."

Title 110 A "Public Offices, Officers and Employees," TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970) Acts 1967, 60th Leg., p. 597, ch. 27:

"§1(c) 'Governmental body' means any board, commission, department, committee, or agency within the executive or legislative

department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; and the governing board of every special district heretofore or hereafter created by law."

TEX. REV. CIV. STAT. ANN., art. 6252-17a (Supp. 1979) Acts 1973, 63rd Leg., p. 1112, ch. 424:

"§2(1) 'Governmental body' means:

"(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof;"

APPENDIX B

Clifton BYRD et al.,
Plaintiffs-Appellants,

versus

CITY OF SAN ANTONIO, TEXAS et al.,
Defendants-Appellees.

No. 77-1014.

United States Court of Appeals,
Fifth Circuit.

Jan. 2, 1979.

Rehearing and Rehearing En Banc
Denied Feb. 2, 1979.

Appeal from the United States District Court for the Western District of Texas

---

Before GEE and VANCE, Circuit Judges, and HUNTER,* District Judge.

EDWIN F. HUNTER, Jr., District Judge:

Plaintiffs instituted this suit to redress the alleged deprivation of federal constitutional and statutory rights. It is in essence a frontal attack upon what plain-

---

* United States Senior District Judge for the Western District of Louisiana, sitting by designation.

tiffs refer to as "self perpetuation of the control and management of a municipal bureaucracy, the City Public Service Board of San Antonio." They contend that the procedure utilized in selecting Board members deprives them of their right to vote, and constitutes a denial both of Equal Protection[1] and the right to a Republican Form of Government.[2] The district court dismissed the action, finding that each claim alleged was, as a matter of law, wholly without merit. We AFFIRM.

I. FACTUAL BACKGROUND

In 1942, the City of San Antonio acquired ownership of the gas and electric utility system in that city. This purchase was financed by the proceeds from the sale of $33,950,000 first mortgage bonds. The bonds were issued pursuant to Article 1111, et seq., of the Texas Civil Statutes, which allow Texas cities to purchase utility systems through the issuance of bonds secured by a pledge of the revenues from operation of the systems, provided that such obligations shall never be a debt of the City but solely a charge upon the revenues of the encumbered systems. Article 1115 provides for the management and control of such systems during the time of encumbrance to be placed either in the City Council or in a Board of Trustees, to be named in the contract of encumbrance, having not more than five members, one of whom must be the mayor of the city. The statute further provides:

1 United States Constitution, Amendment XIV, §1.

2 United States Constitution, Article IV, §4.

> The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance.

Pursuant to this authority, the Trust Indenture securing the original issue of bonds vested management of the systems in a five-member board, including the mayor as an ex officio member. The other initial members were appointed by the City Council. Any vacancy on the Board is filled by a majority vote of the remaining board members. The term of membership is fixed at five years. The individual members of the Board cannot "perpetuate" themselves in office because the indenture limits members to two terms of service. This 1942 indenture, authorized by an ordinance of the City Council, was superseded by an indenture dated February 1, 1951, also adopted as an ordinance, and contained identical selection provisions. The 1951 indenture was amended by seven supplemental indentures, each duly authorized by a city ordinance. The management provisions of the 1951 indenture were incorporated by reference into each supplemental indenture. The three most recent issues of revenue bonds occurred in 1975, 1976 and 1977. These are referred to as "New Series" Revenue Bonds and were issued under ordinances authorizing a Board selection method different from that prescribed in the

1951 indenture. The new procedure may be utilized only upon the payment of all the Old Series Bonds.[3]

The basic claim of constitutional deprivation is premised on the presumption that the Board is "a form of government" subject to strictures of republicanism and federal voting controls. This premise is incorrect. The only "governmental body" of San Antonio to which the constitutional and statutory provisions urged by appellants would apply is the City Council. Only it can issue bonds for extending or improving the system. Only the Council can review, revise or set rates. Only the Council can authorize condemnation of land. The district court's holding that the Board

> "is not a form of government but is a board of managers of the municipally-owned San Antonio Electric and Gas system held and operated as a corporate and proprietary activity of the City of San Antonio"

is precisely correct. See *San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976).

---

3 We are not suggesting that the City of San Antonio is powerless to change the existing selection process now. Indeed, it has consistently expressed its preference to retain the present selection procedure until all of the Old Series bonds have been retired. There are now $195,000,000 in bonds still outstanding which contain the provisions for management in the trust indentures issued from 1951 through 1974. There are $170,000,000 in bonds issued under the New Series.

There is no statute or constitutional provision which requires election — or appointment by elected officials — of the persons who carry out this proprietary and non-governmental function. The appellants cite neither judicial nor statutory law which would hold that the officers in question are legislative officers under the appropriate federal standards, or that their selection by the methods appellants urge would be required as a matter of law.[4] See *Sailors v. Board of Education*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D. N.Y., 1974), aff'd. 420 U.S. 985, 95 S.Ct. 1418, 43 L.Ed.2d 667 (1975); *Benner v. Oswald*, 444 F.Supp. 545 (M.D.Pa., 1978).

Appellants insist that the vacancy selection procedure denies them the Republican Form of Government guaranteed by the Constitution, because the Board has been effectively removed from direct or indirect accountability to the electorate. The Supreme Court has consistently held that the Guaranty Clause is primarily political in nature, and its enforcement is a matter for Congress rather than the courts. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912); *Ohio ex rel. Bryant v. Akron Metropolitan Power District*, 281 U.S. 74, 50 S.Ct. 228, 74

---

4 Appellants insist "that elections be promptly held in order that new members of the Board may be Constitutionally selected or, in the alternative, order that Defendants * * * as members of the City Council of the City of San Antonio, fill the existing vacancy and appoint trustees to serve the remainder of the appointive members terms;"

L.Ed. 710 (1930); *Colegrove v. Green*, 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Someday, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause.[5] This is definitely not such a case.

The City Public Service Board does not usurp from the City of San Antonio nor can it, as a matter of law, exercise in its own right any governmental powers which would result in constituting it either a "form of government" or a "governmental body." In the area in which we are involved — federal constitutional and statutory law — we find no support for plaintiffs' contentions. They insist that the ordinances and indentures, pursuant to which the Council delegated to the remaining members of the Board the power to fill vacancies, exceeded the authority granted to the Council under the state statute. The problem presented by that contention is, of course, simply a matter of interpretation of state law, and does not present a federal question.

The judgment of the district court is AFFIRMED.[6]

---

5 The majority concurring opinion by Judge Wisdom in *Kohler v. Tugwell*, 292 F.Supp. 978, 985 (E.D.La. 1968), aff'd 393 U.S. 531, 89 S. Ct. 879, 21 L.Ed.2d 755 (1969).

6 One of the many allegations of the complaint is that the vacancy appointment procedure "is for the purpose and has the effect of continuing racial and ethnic discrimination * * * by the virtual exclusion of Mexican-Americans and the total exclusion of Blacks from the City Public Service Board of San Antonio." It was revealed during argument that there are now four (4) appointed members. Two are Mexican-Americans, one of whom is Chairman. One member is Black. One member is Anglo.

APPENDIX C

CITY PUBLIC SERVICE BOARD —

Decision of NLRB

THE CITY PUBLIC SERVICE BOARD OF SAN ANTONIO, San Antonio, Tex. and ASSOCIACION DE OBREROS MEXICO - AMERICANOS (International Brotherhood of Electrical Workers, Locals 500, 831, and 1019, AFL-CIO, intervenors), Case No. 23-RC-3678, June 7, 1972, 197 NLRB No. 48

Before Miller, Chairman; Jenkins and Penello, Members.

EMPLOYER Sec. 2(2)

— Political subdivision — 43.607 — 42.10

NLRB dismisses petition for representation election in unit of employees working for public utility that is engaged in distributing gas and electricity, since utility is political subdivision within meaning of LMRA and therefore is exempt from jurisdiction of NLRB.

[*Text*] "The Employer is a public utility engaged in the distribution of gas and electricity to customers in San Antonio, Texas, and certain surrounding areas. It is a nonprofit organization and pays no dividends. Prior to 1942, San Antonio's gas and electric systems were operated by a privately owned utility, the San Antonio Public Service Company. In 1942, the City of San An-

tonio purchased the gas and electric systems under an 'Ordinance and Indenture,' passed by the city commission, authorizing the issuance of $35 million in revenue bonds to acquire all of the property owned by the private company. This ordinance and indenture was superseded in 1951 by a trust indenture, passed by the city commission, authorizing the issuance of $26.3 million of City of San Antonio Electric and Gas Revenue Refunding Bonds to refund the bonds issued in 1942. This indenture, under which the City Public Service Board now operates, was similar to the 1942 indenture but also authorized the issuance of improvement revenue bonds to finance improvements and extensions of the gas and electric systems. Such bonds have been issued under a number of supplemental indentures passed by the city council, which replaced the city commission as the governing body of San Antonio. The bonds were secured by mortgaging the various properties owned by the Employer and described in the indentures; the mortgage deeds refer to the city of San Antonio as the owner of the properties.

"The indenture provides that the Employer is to be operated by a board of trustees, which is 'vested with all of the powers of the City with respect . . . to' the management and operation of the gas and electric systems and the expenditure and application of the revenues therefrom, and 'may manage and conduct the affairs of the systems with the same freedom and in the same manner ordinarily employed by the Board of Directors of private corporations operating properties of a similar nature.' The indenture states that certain

actions are to be taken by 'the Board of Trustees' and others by 'the City, acting through the Board of Trustees.'

"There are five members of the board of trustees, four elected for five-year terms who may be reelected once and one, the mayor of San Antonio, ex officio. The mayor receives no additional compensation for serving on the board of trustees; the other trustees receive $2,000 per year, except that the chairman receives $2,500. The original trustees, other than the mayor, were appointed by the city commissioners, and their names were set forth in the indenture. Since that time, all vacancies have been filled by vote of a majority of the remaining trustees; approval by the city council is not required but has been obtained as a courtesy. Trustees other than the mayor may be removed for cause by unanimous vote of the other trustees.

"The board of trustees administers the gas and electric systems in essentially the same manner that a private corporation is administered by its board of directors. It meets once a month for about an hour to decide general policy questions, while day-to-day administration is in the hands of a general manager appointed by the board. These board meetings are open to the public, as required by statute.

"The Employer's records are considered public records, and the city council has the right to inspect the Employer's books at any time. The indenture requires

the Employer to submit an annual financial report to the city. This report includes an audit by a nationally known firm and is published in a newspaper of general circulation. The Employer also gives the city council copies of its budgets, but approval by the latter is not required. The Employer does its own purchasing, and can spend money for any purpose authorized by the indenture. However, if the Employer needs more funds, it must ask the city council to issue bonds.

"The Employer bills customers for gas and electric services and collects fees for garbage picked up by the city; it retains all funds in bank accounts under its own name, except that the revenue from garbage collection goes into the city's general fund. The Employer pays no income taxes or real estate taxes. Under a 1960 amendment to the trust indenture, however, the Employer must pay the city 14 percent of its gross revenue each month in lieu of taxes. Part of this payment is in the form of gas and electric services and installation of street and traffic lighting systems; the remainder is in cash.

"The Employer enters into contracts in its own name. It has title to personal property, which it buys and sells as it wishes. However, title to real property used by the Employer is in the name of the city, and such property may be sold only when the city council passes an ordinance authorizing such sale. Revenues derived from the sale of real property go into the Employer's general fund.

"The Employer has the power of eminent domain, and may condemn property belonging to the State or its political subdivisions, but the city, not the Employer, obtains title to property acquired by condemnation. Its power in this respect is unlike that of privately owned utilities in Texas, which have the power of eminent domain but may not condemn the property of the State or its political subdivisions. The Employer cannot sue in its own name; it brings condemnation suits in the name of 'The City of San Antonio, acting by and through the City Public Service Board of San Antonio.' The statute of limitations has been held inapplicable in suits by the Employer, while a statute requiring that notice of intent to bring a claim against the city for personal injury be given within 90 days of the injury has been applied to suits against the Employer.

"If the city council were dissatisfied with the Employer's operation of the gas and electric systems, it could call a referendum to approve the issuance of general obligation bonds to refund the bonds which finance the operations of the Employer. This would amount to abolishing the City Public Service Board. The officials of the city would then decide whether to operate the gas and electric systems directly, create a new structure to operate them, or sell them to a private company.

"The Employer's board of trustees determines the terms and conditions of employment for all employees without obtaining the approval of the city council. The

employees are not subject to the jurisdiction of the city's civil service commission; and are hired by the Employer's employment department, rather than by the central personnel office which hires municipal employees. The Employer has its own recruitment program and has advertised job openings in The Wall Street Journal under its own name. The employees are paid by the Employer. They have a separate retirement plan, a separate health insurance program, and their own credit union, and must follow a grievance procedure applicable only to employees of the Employer. They are not covered by the state workmen's compensation law, but are covered by social security, the Employer having elected to withhold and pay social security taxes in 1957. The Employer does not file reports under the Fair Labor Standards Act. It files annual reports with the EEOC, giving the breakdown by race, ethnic background, and sex of employees in various job categories, but at the date of the hearing[3] was not required to file such reports. Although a Texas statute prohibits political subdivisions from bargaining collectively or entering into collective-bargaining contracts with labor organizations,[4] the Employer has held periodic meetings with repre-

3 The hearing was held before the enactment of the Equal Employment Opportunity Act of 1972, which makes States and their political subdivisions subject to Title VII of the Civil Rights Act of 1964.

4 A three-judge U.S. district court upheld this statute in a suit brought by members of the Petitioner employed by the Employer. Alaniz v. City of San Antonio, Civil Action No. SA 70 CA 304 (W.D. Tex.), decided September 21, 1971.

sentatives of the Joint Intervenors for many years. At these meetings, wages and conditions of employment are discussed; the current working conditions are set forth in an unsigned memorandum of agreement. In an agreement signed by the Employer's general manager and assistant general manager and representatives of the Joint Intervenors, the general manager agreed to recommend certain changes in wages and working conditions to the board of trustees. This agreement provided for a reopening of discussions for the 'purpose of considering the request for "dues checkoff" and "exclusive bargaining rights." '

"The Petitioner and the Joint Intervenor contend that the City Public Service Board is an 'employer' within the meaning of Section 2(2) of the Act. The Employer contends that it is an agency of the city of San Antonio and is thus exempt from the Board's jurisdiction as a political subdivision of the State of Texas.

"We find merit in the Employer's contention. The Board has held that the 'political subdivision' exemption in Section 2(2) of the Act encompasses entities which are either created directly by the State, or administered by individuals who are responsible to public officials or to the general public. In the instant case, the Employer was created by a city ordinance enacted pursuant to a state statute specifically authorizing home rule cities to acquire and operate gas and electric systems. Its operations were financed initially by bonds issued with the approval of the city

commission, and are still financed in part by additional bond issues requiring the city council's approval. The city council, by calling a referendum to refund those bonds and issue new ones, could abolish the Employer. In addition, the original trustees were appointed by elected public officials — the city commissioners — and were vested with the powers of the city with respect to the management and operation of the gas and electric systems. An elected public official — the mayor — is an ex officio member of the board of trustees.

"It is thus apparent that the Employer satisfied the criteria established by the Board for determining political subdivision status. We note, in addition, that a number of factors considered by the Supreme Court in the Hawkins County case[5] are also present here: the Employer has the power of eminent domain and can exercise it against governmental entities; it pays no income or real estate taxes, and income from its bonds is exempt from taxation; its records are public records; its trustees receive nominal or no compensation; and coverage of its employees under social security is voluntary rather than mandatory. Furthermore, the Employer can sue or be sued only in the name of the city; the title to the real property it uses is in the name of the city; and the sale of such property requires the approval of the city council. The factors relied on by the Petitioner, including the Employer's autonomy in day-

5 N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 77 LRRM 2348.

to-day operations and in labor relations, are not controlling.[6]

"As we have concluded that the City Public Service Board is a political subdivision exempt from the coverage of the Act, rather than an 'employer' within the meaning of Section 2(2) of the Act, we shall dismiss this petition."

Petition is dismissed.

6 Hawkins County, supra; Fayetteville-Lincoln County Electric System, 183 NLRB No. 19, 74 LRRM 1278.

Supreme Court, U. S.
FILED
JUN 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,

Petitioners,

versus

CITY OF SAN ANTONIO, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. W. BAKER
JON C. WOOD
W. ROGER WILSON
1500 Alamo National Building
San Antonio, Texas 78205

Attorneys for Members of the City Public Service Board of San Antonio

JANE MACON, City Attorney
CRAWFORD B. REEDER
First Assistant City Attorney
City Hall
San Antonio, Texas 78205

Attorneys for Remaining Respondents

Of Counsel:
MATTHEWS, NOWLIN, MACFARLANE & BARRETT

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

QUESTIONS PRESENTED 2

REASONS WHY THE WRIT SHOULD BE DENIED 3

I. The Fifth Circuit correctly determined that the City Public Service Board is a proprietary and non-governmental body which is not subject to the standards of republicanism and voting rights under federal constitutional and statutory law 3

II. Petitioners' Guaranty Clause claims and 14th Amendment claims raise nonjusticiable political questions 6

III. Petitioners' contentions that the selection method for the City Public Service Board fails to comply with the directives of Article 1115, Vernon's Texas Civil Statutes, presents no federal question for determination by this Court 8

CONCLUSION 9

CERTIFICATE OF SERVICE 11

CITATIONS

Page

Constitution of the United States:

Article IV, Section 4 2,7

14th Amendment 5,6

Statutes of the State of Texas:

Vernon's Texas Civil Statute, art. 1111b 3

Vernon's Texas Civil Statute, art. 1113a 3

Vernon's Texas Civil Statute, art. 1115 4,8

Vernon's Texas Civil Statute, art. 1123 3

Vernon's Texas Civil Statute, art. 1175 3

Cases:

Alaniz v. City of San Antonio, 80 L.R.R.M. 2983 (U.S.D.C. W.D.Tex. 1971) 4

Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 35 L.Ed.2d 675 (1973) 5

Avery v. Midland County, 390 U.S. 474, 485, 20 L.Ed.2d 45, 53-54, (1968) 6

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 691 (1962) 7

Benner v. Oswald, 444 F.Supp. 545 (M.D. Pa. 1978) 6

Burch v. City of San Antonio, 518 S.W.2d 540 (Tex. 1975) 4

CITATIONS (Continued)

Page

Burton v. Whittier Vocational Regional School District, 449 F.Supp. 37 (D. Mass. 1978), *aff'd.* 587 F.2d 66 (1st Cir. 1978) 6

City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972) 4

Egan v. Wisconsin State Board, 332 F.Supp. 964 (E.D. Wis. 1971) 6

Garza v. City of Robstown, 483 S.W.2d 32 (Tex.Civ.App. — Corpus Christi 1972, no writ) 4

Guadalupe-Blanco River Authority v. Tuttle, 171 S.W.2d 520 (Tex.Civ.App. — San Antonio) *aff'd.* 141 Tex. 523, 174 S.W.2d 589 (1943) 8

Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 58-59, 25 L.Ed.2d 45, 52, (1970) 6

Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 81 L.Ed. 835 (1937) 7

Morris v. City of San Antonio, 572 S.W.2d 831 (Tex.Civ.App. — Austin 1978, no writ) 8

Oaks v. Board of Trustees, 385 F.Supp. 392 (N.D. Miss. 1974) 6

O'Neill v. Leamer, 239 U.S. 244, 60 L.Ed. 249 (1915) 7

CITATIONS (Continued)

Page

Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 56 L.Ed. 377 (1912) 7

Rosenthal v. Board of Education, 385 F.Supp. 223 (E.D. N.Y. 1974), *aff'd.* 420 U.S. 985, 43 L.Ed.2d 667 (1975) 6

Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 18 L.Ed.2d 650 (1967) 5-6

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 35 L.Ed.2d 659 (1973) 5

San Antonio Independent School District v. Board of Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex. Civ.App. — El Paso 1947, writ ref'd) 8-9

San Antonio Independent School District v. City of San Antonio, 550 S.W.2d 262 (Tex. 1977) 4,8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,
Petitioners,

versus

CITY OF SAN ANTONIO, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of San Antonio, Texas (San Antonio) and the other named Respondents oppose the Petition for Writ of Certiorari filed herein by Clifton Byrd, et al., and request this honorable Court to deny certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reported at 587 F.2d 184, on grounds that that court's decision is correct as a matter of federal law and that Petitioners present only nonjusticiable political issues and raise claims based only on state law which are without merit.

QUESTIONS PRESENTED

The Fifth Circuit Court of Appeals has determined no significant precedent-setting issues but has merely disposed of Petitioners' claims on the basis of well-settled federal principles.[1] One essential question, which was correctly decided by the Court of Appeals is presented in this case:

1. Whether the City Public Service Board of San Antonio is a "form of government" subject to the Guaranty provisions of Article IV, Section 4 of the United States Constitution and to the voting protections of federal statutes.

Related questions presented which the court below correctly recognized as dispositive of Petitioners' claims are the following:

2. Whether Petitioners' Guaranty Clause claims present a justiciable issue.

3. Whether Petitioners' claims questioning the San Antonio City Council's authority initially to prescribe the City Public Service Board's method of filling trustee vacancies raise only questions of state law.

---

1 The facts of this case, as well as the controlling issues and legal principles, are as set forth in the opinion of the Fifth Circuit, Pet. 5a-10a.

REASONS WHY THE WRIT SHOULD BE DENIED:

I. The Fifth Circuit correctly determined that the City Public Service Board is a proprietary and nongovernmental body which is not subject to the standards of republicanism and voting rights under federal constitutional and statutory law.

Like other municipal corporations, the City of San Antonio exercises a wide variety of functions, ranging from legislative exercise of the state's police power to nongovernmental administrative and proprietary activities which partake of no legislative discretion. The city's traditional legislative powers are exercised only by the city's one governing body, the San Antonio City Council. This is true of the governmental powers whose exercise affects the city's municipally owned gas and electric systems: *only* the San Antonio City Council has the authority, pursuant to state statute, to levy and collect taxes [Art. 1175, Vernon's Texas Civil Statutes], review and set rates and charges for electric and gas service [Art. 1123], issue bonds for system improvements and extensions on whatever terms the council may choose [Art. 1111b], sell real property or improvements of the electric and gas systems [Art. 1175], control and disburse the "profits" of utility operations up to 14 percent of gross revenues for whatever general municipal purpose the council chooses [Art. 1113a], and, as determined by the Texas

Supreme Court's interpretation of Art. 1109b in *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975), exercise the power of eminent domain.

The boards of trustees through which cities are authorized under Article 1115, Vernon's Texas Civil Statutes, to operate their municipally owned electric and gas systems are neither vested with nor exercise any of these powers, and have no authority to exercise the general police power of the State for any purposes. The board, which Petitioners admit has no capacity to sue or be sued in its own name (Pet. 8), has the limited function of managing and operating the electric and gas systems, as a proprietary function of the city. See *San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262 (Tex. 1977). Proprietary boards established pursuant to Article 1115 — notwithstanding that they are within the generic classification of "municipal corporations" for purposes of state and federal statutes as an agency of the City, consistent with the results reached in *Alaniz v. City of San Antonio*, 80 L.R.R.M. 2983 (1971) and *City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos*, 197 N.L.R.B. 312 (1972) — have never been deemed to be "governing bodies" in the legislative sense under state law, much less for purposes of federal statutory and constitutional law. See *Garza v. City of Robstown*, 483 S.W.2d 32 (Tex.Civ.App. — Corpus Christi 1972, no writ); *Burch v. City of San Antonio*, supra.

The City Public Service Board thus exercises none of the traditional governmental functions to which this Court has applied the principles of "one man-one vote." As stated by the Fifth Circuit in this case:

> There is no statute or constitutional provision which requires election — or appointment by elected officials — of the persons who carry out this proprietary and non-governmental function. The [Petitioners] cite neither judicial nor statutory law which would hold that the officers in question are legislative officers under the appropriate federal standards, or that their selection by the methods [Petitioners] urge would be required as a matter of law. 587 F.2d at 186; Pet. 9a.

This Court has refused to extend 14th Amendment voting standards to elections in special purpose districts which had "relatively limited authority," even though they exercise some typical governmental powers which as a matter of law the City Public Service Board lacks. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 35 L.Ed.2d 659 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 35 L.Ed.2d 675 (1973). Moreover, the Court has made clear that the *appointment* of non-legislative state or local officers not subject to election, such as the trustees here, is a matter of state discretion. *Sailors v. Board of Education of the County of Kent*, 387 U.S.

105, 18 L.Ed.2d 650 (1967).[2] The Court reaffirmed that right of flexibility in municipal arrangements in both *Avery v. Midland County*, 390 U.S. 474, 485, 20 L.Ed.2d 45, 53-54, (1968), and *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 58-59, 25 L.Ed.2d 45, 52, (1970).[3]

Petitioners cannot bridge the chasm between the class of entities to which this Court applies voting standards and the undisputable facts that the City Public Service Board is appointed, not elected, and has only limited proprietary functions. Instead, they seek to have this Court extend voting right principles far beyond the boundaries established by the Court's prior decisions.

II. Petitioners' Guaranty Clause claims and 14th Amendment claims raise nonjusticiable political questions.

Even if Petitioners' claims of constitutional deprivation were leveled at a federally cognizable "form of

2 The City Public Service Board is an appointive board, contrary to Petitioners' contention. The office of Mayor of San Antonio has been subject to popular election only since 1975, being selected in previous years by members of the City Council from among their number, and the mayor sits as a trustee of the board on an ex officio basis.

3 See also, *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D. N.Y. 1974), *aff'd.* 420 U.S. 985, 43 L.Ed.2d 667 (1975). This principle has been consistently applied by lower federal courts. *E.g., Egan v. Wisconsin State Board*, 332 F.Supp. 964 (E.D. Wis. 1971); *Oaks v. Board of Trustees*, 385 F.Supp. 392 (N.D. Miss. 1974); *Benner v. Oswald*, 444 F.Supp. 545 (M.D. Pa. 1978); *Burton v. Whittier Vocational Regional School District*, 449 F.Supp. 37 (D. Mass. 1978), *aff'd.* 587 F.2d 66 (1st Cir. 1978).

government," which the City Public Service Board of San Antonio patently is not, their invocation of Article IV, Section 4 of the federal Constitution presents only a political question. This Court's decisions have established that Guaranty Clause claims are not appropriate for judicial determination. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 56 L.Ed. 377 (1912); *O'Neill v. Leamer*, 239 U.S. 244, 60 L.Ed. 249 (1915); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 81 L.Ed. 835 (1937).

More significantly, this Court made clear in *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 691 (1962) that a Fourteenth Amendment claim may itself be "so inmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself." This is just such a case. Petitioners have failed to show the applicability of any of the standards this Court has used to test for deprivation of constitutional voting rights. Their failure to address these standards makes clear that Petitioners' Equal Protection claims are invoked solely in aid of their contention that the trustee selection method for a proprietary and nonlegislative appointed board is invalid as "non-republican." Petitioners' entire cause of action seeks the resolution of a political question and does not warrant this Court's consideration.

III. Petitioners' contentions that the selection method for the City Public Service Board fails to comply with the directives of Article 1115, Vernon's Texas Civil Statutes, presents no federal question for determination by this Court.

The City Council ordinances and bond indenture provision establishing the trustee selection method attacked by Petitioners are based on the authority of Article 1115, Vernon's Texas Civil Statutes, which provides:

> The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance.

Petitioners' assertions under their final point that the existing selection method for the trustees is not authorized by this statute are defeated by the very Texas cases they cite, which have established the validity of the trustees' status under Texas law. *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d 520 (Tex.Civ.App. — San Antonio) *aff'd.* 141 Tex. 523, 174 S.W.2d 589 (1943); *see San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262 (Tex. 1977); *Morris v. City of San Antonio*, 572 S.W.2d 831 (Tex.Civ.App. — Austin 1978, no writ); *San Antonio Independent School District v. Board of*

Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex.Civ.App. — El Paso 1947, writ ref'd). Since Petitioners have failed to state an actionable or substantial claim under the federal laws or Constitution, these pendent state claims of Petitioners are not properly before the Court.

CONCLUSION

Based upon the pleadings and undisputed facts, Petitioners have wholly failed, as a matter of law, to allege a cause of action that they have been wrongfully deprived of any constitutional or federal statutory rights. This Court's holdings have made plain that the standards of equal voting rights are not to be applied to nonlegislative, non-elected municipal entities such as the City Public Service Board. The line thus drawn by the Court has the practical effect of leaving to state and local discretion the selection method for a multitude of municipal functionaries whose powers and responsibilities are nongovernmental. Petitioners' claims raise only political issues and are otherwise devoid of substance. For the reasons shown, the Petition for writ of certiorari should be denied.

Respectfully submitted,

F. W. BAKER
JON C. WOOD
W. ROGER WILSON

1500 Alamo National Building
San Antonio, Texas 78205
(512) 226-4211

ATTORNEYS FOR
MEMBERS OF THE CITY
PUBLIC SERVICE BOARD
OF SAN ANTONIO

JANE MACON,
City Attorney
CRAWFORD B. REEDER
First Assistant City Attorney
City Hall
San Antonio, Texas 78205

ATTORNEYS FOR
REMAINING RESPONDENTS

Of Counsel:
MATTHEWS, NOWLIN,
MACFARLANE & BARRETT

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 1979, three copies of Respondents' Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Craig L. Austin, Esq., Suite 727, 711 Navarro, San Antonio, Texas, 78205, counsel for the Petitioners. I further certify that all parties required to be served have been served.

JON C. WOOD
1500 Alamo National Building
San Antonio, Texas 78205

Counsel for Respondents

Of Counsel:

MATTHEWS, NOWLIN,
MACFARLANE & BARRETT

Supreme Court, U. S.
FILED
AUG 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,

Petitioners,

versus

CITY OF SAN ANTONIO, et al.,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CRAIG L. AUSTIN
Suite 727, 711 Navarro
San Antonio, Texas 78205

Phone: (512) 222-2331

Attorney for Petitioners

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

CITATIONS ii

REPLY TO RESPONDENTS' REASONS WHY THE WRIT SHOULD BE DENIED:

I. The City Public Service Board of San Antonio is a "form of government" subject to the standards of republicanism and voting rights. 2

II. Adjudication of the legality of a scheme by which the selection of public officers is placed beyond the direct or indirect control of the voters cannot, as a matter of law, involve a "political question." 7

III. A proper construction of TEX. REV. CIV. STAT. ANN. art. 1115 (1963) allowing the City Council of San Antonio to specify the organization and duties of the trustees and "the election of their successors" turns upon the application of federal constitutional and statutory law; it does not present points of state law beyond the jurisdiction of this Court. 9

CONCLUSION 10

CERTIFICATE OF SERVICE 13

CITATIONS

Page

Constitution of the United States:

Article IV, Section 4 6,11

14th Amendment 10

Statutes of the State of Texas:

TEX. REV. CIV. STAT. ANN., art. 1111a, §2 8

TEX. REV. CIV. STAT. ANN., art. 1111b, §2 8

TEX. REV. CIV. STAT. ANN., art. 1115 (1963) .9,10

Cases:

Alaniz v. City of San Antonio, 80 LRRM 2893 (U.S. D.C. W.D. Tex. 1971) 4

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) 10

City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972) 3,4

Guadalupe-Blanco River Authority v. Tuttle, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio) aff'd 141 Tex. 523, 174 S.W.2d 589 (1943) 4

Hadley v. Junior College District, 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 791 (1969) 5

Morris v. City of San Antonio, 572 S.W.2d 831 (Tex. Civ. App.-Austin 1978, no writ) 4

CITATIONS (Continued)

Page

Sailors v. Kent Board of Education, 387 U.S. 105, 18 L.Ed. 2d 650, 87 S.Ct. 1549 (1966) 7

San Antonio Independent School District v. Board of Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex. Civ. App.-El Paso 1947, writ ref'd) 4

San Antonio Independent School District v. City of San Antonio, 550 S.W.2d 262 (Tex. 1976) 4

Miscellaneous:

Black's Law Dictionary (4th Ed. 1957) 11

4 Elliot's Debates 195 (1891) 11

Obdyke, Constitutional Law: Expanding Definition of Republican Form of Government Under the Guaranty Clause, 13 Washburn Law Rev. (1974) 12

San Antonio Light (July 15, 1979) 8

The Federalist No. 39 (Wright Ed. 1961) (J. Madison) 11

The Federalist No. 43 (Wright Ed. 1961) (J. Madison) 12

United States Department of Commerce, Bureau of the Census (1970) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,
Petitioners,

versus

CITY OF SAN ANTONIO, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents do not deny that the City Public Service Board of San Antonio is "self-perpetuating." Nor do they deny that the employees, funds and property over which the Board holds dominion are public. The Court of Appeals' approval of the self-perpetuating proprietary body and its introduction into American constitutional jurisprudence is a major and potentially expand-

ing innovation in public administration. It warrants the attention of the Supreme Court.

I. The City Public Service Board of San Antonio is a "form of government" subject to the standards of republicanism and voting rights.

The issue in this case is *accountability*. As validated by the Court of Appeals, the legal status of the City Public Service Board presents an extraordinary and unprecedented accumulation of governmental powers, privileges, immunities, funds, personnel and property. Yet there is a complete absence of the constitutional, statutory, regulatory and economic inhibitions which operate upon an entity which is either clearly public or clearly private:

1. The Board has a monopoly upon the sale of electricity and gas in Bexar County, Texas, and in large segments of six adjoining counties. It is impossible to estimate what percentage of the residents of adjoining counties are subject to its rule-making powers, power of eminent domain and power to budget and spend the admittedly "public" funds collected from those areas. But it is undeniable that all 830,460[1] of Bexar County's residents are subject to these powers. Of this larger number, San Antonio's 773,248[2] citizens elect one person to the five-member board. The other four seats are held by self-perpetuating trustees who are totally devoid of either constituency or representative status.

1 United States Department of Commerce, Bureau of the Census, 1970.

2 United States Department of Commerce, Bureau of the Census, 1970.

2. These Board members, four-fifths self-appointed, choose their own successors in office, elect each other to additional terms and have exclusive power over their own removal for cause.[3] Keeping in mind that the trustees may be individually or collectively removable for cause in the event of misappropriation, massive failure of service or the meltdown of a nuclear reactor, their being the judges of their own cause presents a particularly disturbing possibility.

3. A monoply controlling indispensable services is unchecked by competition. Its customers, having no alternatives other than candles, windmills and bottled gas, must accept its services under whatever terms are offered.

4. Having successfully argued that it is a "political subdivision of the State of Texas," the Board has eluded federal regulation.[4]

3 The indenture provides in Article VI, Section 1, "Any member of the Board other than the Mayor of the City may, by unanimous vote of the remaining members of the Board, be removed from office, but only for adequate cause."

4 City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972).

5. By establishing itself as a "municipal corporation," it has evaded state regulation by the Texas Public Utility Commission.[5]

6. It has avoided rendering its income, deposits and property to federal, state and local tax collectors by obtaining adjudications that the payment of such levies would be out of "public money."[6]

7. By consistently asserting that it is a "department or agency of the City,"[7] the Board has secured and is now exercising and enjoying the many other uniquely governmental powers, privileges and immunities which the National Labor Relations Board itemized in its opinion.[8]

8. Upon its contention that the Trustees are "officials of a city" and its labor force consists of "public employees,"[9] such accountability as may arise out of

---

5 Morris v. City of San Antonio, 572 S.W.2d 831 (Tex. Civ. App.-Austin 1978, no writ).

6 San Antonio Independent School District v. City of San Antonio, 550 S.W.2d 262 (Tex. 1976) and San Antonio Independent School District v. Board of Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex. Civ. App.-El Paso 1947, writ ref'd).

7 Guadalupe-Blanco River Authority v. Tuttle, 171 S.W.2d 520 (Tex. Civ. App.-San Antonio) aff'd. 141 Tex. 523, 174 S.W.2d 589 (1943).

8 City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos, 197 N.L.R.B. 312 (1972).

9 Alaniz v. City of San Antonio, 89 LRRM 2893 (U.S.D.C., W.D. Tex. 1971).

the collective bargaining process has been circumvented.

Contrary to all of its previous positions, the Trustees have now convinced the Court of Appeals that they are "nongovernmental" and, therefore, immune from "republicanism and voting rights." Petitioners' answer to this contention is both simple and compelling: The Trustees are bound by the adjudications and administrative determinations which they have previously obtained. They cannot be heard to renounce their public status when their sole objective is to frustrate accountability as a public body.

A distinction is drawn by the Trustees between "legislative" bodies, which they admit are subject to "republicanism" and "voting rights," and "administrative and proprietary" bodies, which, they say, are not. As this Court pointed out in *Hadley v. Junior College District*, 397 U.S. 50, 25 L.Ed. 2d 45, 90 S.Ct. 791 (1969), that distinction is obsolete:

> "It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery v. Midland County, supra*, 390 U.S. 474 at 482, [88

S.Ct. 1114, 20 L.Ed.2d 45] and it must also be rejected."

In this respect, however, one point raised by the Trustees is of particular interest. They characterize as a "governmental power" the City Council's "control and disburse(ment of) the 'profits' of utility operations up to 14 percent of gross revenues. . ." Would it not follow that the Board's control over and disbursement of the other 86 percent is likewise a "governmental power"?

Without the slightest authority to support their position, the trustees argue that republicanism applies only to "the city's one governing body, the San Antonio City Council." But Article IV, Section 4 of the United States Constitution plainly applies the term to the entire "form of government" in this case, the municipal corporation.

Numerous federal cases[10] are cited by the Trustees for the proposition that "the *appointment* of nonlegislative state or local officers not subject to election such as the Trustees here, is a matter of state discretion." Petitioners are in complete agreement. What the Trustees overlook is that each of the approved systems of selection rested upon *direct appointment by duly elected representatives.*

Petitioners' dispute is not with public appointment. It

10 Pages 5 and 6 of Respondent's Brief.

is clearly required by *Sailors v. Kent Board of Education*, 387 U.S. 105, 18 L.Ed.2d 659 (1966):

> "At least as respects nonlegislative officers, *a State can appoint local officials* or elect them or combine the elective and appointive system as was done here. (Emphasis added)."

Four members of the City Public Service Board are not appointed by "a State." Nor are they appointed by the City Council or any other elected body. The distinction is between the constitutionally valid process of election or public appointment on the one hand and the politically incestuous practice of self-perpetuation on the other.

II. Adjudication of the legality of a scheme by which the selection of public officers is placed beyond the direct or indirect control of the voters cannot, as a matter of law, involve a "political question."

Respondents' arguments on this point are notable for their lack of specificity.

Just what political remedy might the people of San Antonio employ to regain control of their electric and gas system? They can elect a mayor who is pledged to carry out their will, but their elected representative has only one vote out of five. Refinancing the bonds so as to eliminate the Board is not possible because of the stat-

utory prohibition against refunding them at the higher current interest rates. TEX. REV. CIV. STAT. ANN. arts 1111a, §2 and 1111b, §2 (1963). Four self-perpetuating trustees apparently have a federally enforced entitlement to their powerful positions; the Court of Appeals has so held. Political muscles cannot be flexed against vested contractual rights.

Neither the Respondents nor the Court of Appeals has disclosed any other political remedy or ownership right which may be exercised so as to significantly influence the Board's self-appointment process.

The sad fact remains that more public employees, funds and property in San Antonio are controlled by this self-perpetuating municipal bureaucracy than are controlled by the duly elected and publicly appointed governmental structure. In reality, a San Antonian's vote is less than fifty percent effective.

Congressman Henry B. Gonzales, commenting upon the difficulty of resolving energy problems in the community (San Antonio Light, July 15, 1979) summarized the dilemma succinctly:

> " 'It's a question of whether or not we can get San Antonio united. We can't afford to go at loggerheads with the City Public Service — it does everything in secret and accounts to nobody. This makes it very difficult.' "

Under the existing scheme, the appointment, reappointment or removal of these powerful officers is not a political question. But it should be!

III. A proper construction of TEX. REV. CIV. STAT. ANN. art. 1115 (1963) allowing the City Council of San Antonio to specify the organization and duties of the trustees and "the election of their successors" turns upon the application of federal constitutional and statutory law; it does not present points of state law beyond the jurisdiction of this Court.

For purposes of this appeal, Petitioners accept at face value Respondents' statement that Texas statutes — standing alone, do not prohibit the establishment of a self-perpetuating proprietary board. The vice in the construction which the statute has received lies in transgression upon controlling federal constitutional and statutory law. And whether the state cases under discussion do or do not support the validity of the scheme under Texas law is immaterial; none of the cases decided or purported to decide federal questions.

Respondents are apparently attempting to mislead the Supreme Court in the same manner in which they distracted the Court of Appeals — by asserting that the case is determinable under state claims which are beyond federal jurisdiction.

The substantive claims of Petitioners are purely federal. They encompass only the Guaranty Clause and Fourteenth Amendment to the United States Constitution and the Civil Rights and Voting Rights Acts.

In *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), this Court determined that the proper remedy for the rectification of an unconstitutional governmental form is to order that the body which created it restructure it within constitutional limits. Therefore, upon declaration that the Federal Election Commission was unconstitutionally appointed, Congress was afforded an opportunity to reorganize it in conformity with this Court's ruling.

Under Article 1115, the City Council of San Antonio had — and still has — the power to determine the structure of the City Public Service Board, subject, of course, to applicable federal limitations. Accordingly, this case should be remanded to the District Court in order that the City Council might, by proper ordinance, reconstitute the Board either by ordering its direct election or by instituting public appointment.

CONCLUSION

The opinion of the Court of Appeals has the alarming and, no doubt, unintended effect of bending and twisting the fundamental structure of the law. Public bodies enjoy certain well-defined powers, privileges and immunities and are subject to long-established

modes of accountability which are quite distinct from those enjoyed by and applicable to private entities. The boundary between the public sector and the private sector has always been and must remain a sharply defined line. Unfortunately, the opinion of the Court of Appeals creates a void between those mutually exclusive bodies of law. The City Public Service Board of San Antonio has been permitted to occupy that interspace. The Board enjoys the powers, privileges and immunities of both public and private entities but is subject to the accountability of neither. Such a result is contrary to public policy. Petitioners call upon the Supreme Court to impose accountability.

In THE FEDERALIST, No. 39 (Wright Ed. 1961) (J. Madison), Madison writes that one purpose of the Guaranty Clause is to protect the citizenry from an "oligarchy." BLACK'S LAW DICTIONARY (4th Ed. 1957) defines that term as "a form of government wherein the administration of affairs is lodged in the hands of a few persons." The City Public Service Board is an oligarchy.

It is noted in 4 ELLIOT'S DEBATES 195 (1891) that "[N]o state should have the right to establish an aristocracy or monarchy. That clause, (Article IV, Section 4) was therefore inserted to prevent any state from establishing any government but a republican one." The aristocratic characteristics of a self-perpetuating proprietary bureaucracy are patent. That self-perpetuation is accomplished by personal and dis-

cretionary assignment of public office rather than by procreation is immaterial.[11]

Madison asks in THE FEDERALIST, No. 43 (Wright Ed. 1961) (J. Madison), "[W]ho can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders or by the intrigues and influence of foreign powers?" There can be little question but that the contrivance in question is nothing more nor less than a capricious experiment, showing both ambition and enterprise, whereby the members of the San Antonio City Council of 1942 created and have maintained a powerful and indissoluble patronage device at the expense of the political and property rights of the citizens.

CRAIG L. AUSTIN

11 See also Obdyke, Constitutional Law: Expanding Definition of Republican Form of Government under the Guaranty Clause, 13 Washburn Law Rev. (1974).

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this brief were mailed with adequate postage thereon to:

Mr. Crawford Reeder
Assistant City Attorney
City Hall Annex
San Antonio, Texas 78205

Mr. F. W. Baker
1500 Alamo National Building
San Antonio, Texas 78205

DATED this the ____ day of August, 1979.

CRAIG L. AUSTIN